No. 10621.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

A. M. PEARSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Jurisdictional Statement.

The Information charged that defendant violated the Emergency Price Control Act of 1942, in that he sold service on a radio at a price higher than permitted by Maximum Price Regulation No. 165, issued pursuant to said Act. The offense is alleged to have been committed by defendant in the City of Los Angeles, County of Los Angeles, State of California, and in the Central Division of this district.

A. The District Court had jurisdiction to try the case under the authority of the Emergency Price Control Act of 1942 (Pub. L. 421, 77th Cong., 2nd Sess., 56 Stat. 23, January 30, 1942, 50 U. S. C. A. 925-c).

B. This Court has jurisdiction of the appeal under the provisions of Section 225(a) and (d), Title 28, United States Code.

Questions Involved in the Appeal.

Appellant, in his brief, argues that:

A. The verdict is contrary to law;

B. The evidence is insufficient to support the verdict;

C. The Court erred in denying defendant's motions for a directed verdict; and

D. The Court erred in overruling defendant's Motion for a New Trial.

Said propositions actually present in different forms the single question as to whether the evidence is sufficient to support the verdict.

The questions arising from the attacks made on the sufficiency of the evidence appear to be:

1. Was the offense committed by appellant or by his employee?

2. Did the appellant charge a higher price for the services rendered than he charged for like services in March, 1942?

ARGUMENT.

I.

The Offense Was in Fact Committed by Appellant Instead of by His Employee.

Appellant contends that the work done on the customer's radio was performed by an employee instead of by himself, and argues that within criminal law, a principal is not bound by the acts of his agent.

This theory has no application to the facts of the case.

The Information charged in essence:

> "A. M. Pearson did knowingly, wilfully and unlawfully sell and supply to Lieutenant D. M. Johnson, an individual, service on a certain R. C. A. radio, No. 196679, for the sum of $6.45; that the sale of said service on the R. C. A. radio at $6.45 was in excess of the maximum price permitted * * *." [R. 2.]

It is apparent that the gist of the offense was the "overcharge" by defendant. That it was defendant who made the overcharge is clear from the testimony of the customer, B. M. Johnson, whose testimony includes the following:

> "I had a conversation with the Defendant, A. M. Pearson at the Sky Pilot Radio Shop * * * I told him I had come for my radio. He told me that he had found two tubes defective and that there was trouble in the oscillating circuit and he had to replace them. I did not say anything. I paid the bill he presented." [Tr. 28-29.]

On cross-examination he testified further to the same transaction with defendant:

> "He said he was sorry that it had taken him so long to fix the radio; that he had to fix it himself and worked until ten o'clock the night previous." [R. 30.]

Defendant, testifying on this subject, said:

> "I did no work on the Johnson radio other than check his work and I watched what he was doing.
>
> By the Court: 'If he was an experienced technician why did you watch him?'
>
> A. 'I am supposed to be the manager in the shop. I am supposed to see everything.'" [R. 43.]

The evidence, therefore, sustains the finding of the jury that it was appellant who assessed the overcharge.

The testimony of appellant, to the effect that he watched his technician do the work on the radio, affords a sound basis for the jury's decision that appellant was familiar enough with the job to have acted understandingly and wilfully in his billing for it. It appears clear that as the gravamen of the offense was wilful making of an overcharge, the question of the employee's activity is moot. However, if some of the acts of the employee did enter into the *res gestae,* Section 550 of Title 18, U. S. C. covers the situation:

> "Principals defined. Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal."

II.

Defendant Did Charge a Higher Price for the Services Involved in Count VI, Than He Charged for Like Services in March, 1942.

Appellant's charges for the services for which his customer B. M. Johnson was billed and which Johnson paid are determined by Plaintiff's Exhibit No. 2 (erroneously referred to in the Record as Exhibit 1) which was received in evidence by stipulation. It was stipulated that said exhibit, a letter dated July 25, 1942, constituted defendants' listing of his prices with his War Price and Rationing Board. [R. 21.] Revised Maximum Price Regulation No. 165 (7 Fed. Reg. 4734) required every person selling consumer services subject to the Regulation to so list such prices. Section 1499.108 of said Regulation, covering this subject, is printed as Appendix A.

Page 3 of appellant's said listing contains the following:

> "Replacements and repairs
>
> "These standard charges cover service only and include all testing to locate trouble. Prices for materials used are extra and are listed in the Philco Catalog of parts, accessories, tubes and batteries."

On page 4 is the following:

> "Tubes: replacement $1.00"

The customer had indicated that he wanted a defective tube replaced. The evidence shows that appellant replaced two tubes. The "Labor" item on the bill is $4.70, instead of $1.00. The price of the tubes is not in question.

That one dollar ($1.00) for the "Labor" item on the bill is the ceiling price is established by these words from Plaintiff's Exhibit No. 2:

> "These standard charges cover service only and include all testing to locate trouble * * * Tubes: replacement $1.00."

In the light of the listing, Exhibit No. 2, and the charge of $4.70 for the services involved in the tube replacement, the jury had an ample basis to find that a charge had been made in excess of that which appellant charged for like service during the base period.

The evidence which brings the services ordered by appellant's customer within the foregoing charge includes the following testimony by Johnson, the customer:

> "I set my radio on the counter and another chap came from the back. He asked me if I wanted my radio repaired and what was the matter with it. I told him there was a tube blown out. Mr. Pearson was within a couple of feet of me. I simply told the other party there was a tube blown out in the radio and I would like it fixed. He said, 'All right,' and gave me a slip. Mr. Pearson was still there. I asked when I could pick up the set and he said it would be two or three days as he had a lot of work there. Nothing was said about making repairs." [R. 29.]

On cross-examination the witness testified further to his conversation with the employee:

> "I told him there was a defective tube. I did not tell which one. * * * The employee asked me to sign an order and I signed one. Defendant's Exhibit

'C' bears my signature and it is the order I signed when I took the radio to the store. I do not recall the word 'Repair' being on it at the time I signed it." [R. 29-30.] [Cross-examination.]

"I don't believe 'repair' was on it at the time I signed it. There was nothing else on it. It was a blank." [R. 30.] [Redirect examination.]

Appellant affirmatively urged that he had rendered an additional service, supposedly authorized by the claim that the word "Repair" was on the order form when the customer signed it. Whether the word "Repair" was written in without the customer's authority was a jury question, and was determined adversely to appellant.

Assuming, but not conceding that the customer authorized a "Repair," it would have been appellant 's duty to sell him such a "consumer service" rather than to charge for it under a false pretense that such a service had been rendered and the radio repaired. There was ample evidence upon which a jury, even if in doubt as to whether repairs were authorized, or even if in doubt as to whether the listing, Exhibit No. 2, allowed for a charge in excess of $1.00 for tube testing and installation, could find that no service requiring more than a few minutes' time had been rendered.

The witness Lorenson testified concerning a check made on the radio before it was taken to appellant's shop.

"Mr. Barrett, Arthur Sheets and myself checked the radio. Mr. Barrett tested all of the tubes. I marked all of the parts that might be removed. We

played the radio on all stations, then took a No. 80 tube out and damaged it to the extent it would not play. We put the damaged tube back in the radio and checked it. It did not play." [R. 27.]

Mr. Barrett was a radio technician of over twenty years' experience. [R. 31.] He testified to testing the radio just before it was sent to appellant's shop.

"I made a complete and thorough check of the condition of all the component parts of the radio; the tubes, its alignment and its ability to play completely across the dial. Other than a noisy volume control the set was in good condition. The parts in the radio were marked by Captain Lorenson in my presence. The radio was filthy inside. I intentionally burned out an 80-rectifier tube, that was all, and replaced it in the set." [R. 31.]

Lorenson promptly thereafter gave the set to Johnson. [R. 27.] Johnson immediately took it to appellant. [R. 29.] When it was returned to Johnson by appellant he returned it to Lorenson [R. 27] who took it to the Meyberg Co. where Barrett, an employee of that company, checked it with Lorenson. [R. 28-31.]

Lorenson testified to the examination made at that time as follows:

"When we got the set back everything was the same except there were two tubes—new tubes—in the set. The tube which we purposely blew out was a No. 80 and which I was told was a rectifier tube. This tube had been replaced when I got it back from the Sky Pilot Radio Company. There was also an-

other tube in the set. Otherwise the set was identical with the condition in which it was sent to the Sky Pilot Radio Company." [R. 28.]

Referring to the same examination Barrett testified:

"I observed that the rectifier tube I had blown out had been replaced and another tube, I believe a 6A7 converter tube, was put in. Other than that, to the best of my knowledge there was nothing else done to it. The volume control was in the same condition as before and the set had not been cleaned at all. No parts had been removed." [R. 32.]

The witness Barrett also testified that certain checking was indicated when a rectifier tube had failed in a set.

"I would check the power transformer, the filter and the condenser. You check all of these things in one or two operations. One check covers all of these component parts. * * *

"I was connected with a large wholesale house at the time and we had the most modern testing equipment. The small shops did not have this equipment. Without that modern up-to-date equipment they could make that one test. I am positive of that. The type of equipment that would make that test is an ohmmeter." [R. 33.]

From the evidence it was proper for the jury to believe that appellant did nothing beyond the simplest check, and tube replacement, and the claim of two hours and five minutes of employee's time and fifteen minutes of appellant's time was a mere sham. It is true that appellant denied

this, but a traverse of the Government's evidence raised a question for the jury.

> *Henderson v. United States,* 143 F. (2d) 681 (C. C. A. 9, 1944).

The jury was aided by testimony of appellant's conduct in similar transactions. Mary Galton related a similar transaction. [R. 22.] Mr. Lorenson examined the Galton radio before and after appellant claimed he repaired it and found that:

> "I checked all the connections that might have been soldered, all of them were there with their original solder, none of them had been replaced or worked on." [R. 26.] "* * * It was littered with dust, and the dust was still there when I received it back." [R. 26.]

> "When I saw the radio after Miss Galton had got it back from the Sky Pilot everything was in the same condition as I originally saw it, except that a new tube had been in to replace the defective rectifier tube which I had put in there purposely." [R. 27.]

Appellant had claimed to the customer, Galton, that he had replaced a part. [R. 23.]

Mrs. Leake testified to an overcharge by appellant. [R. 35.]

Her testimony was, in substance that she asked appellant for an estimate on repairs for her table model radio.

Appellant quoted $6.00 and later $14.00 but was told not to do the work. He quoted $3.50 as a price for having inspected the radio. When the customer refused to pay that sum he raised the service charge to $6.50 which was finally collected. [R. 35.] Although the facts of these cases were also disputed, there was ample testimony *re* the Galton and Leake transactions from which the jury could have found an intent to systematically overcharge customers.

Appellant contends the Galton and Yeake transactions cannot be considered as evidence of his intent because he was acquitted of counts based upon those particular transactions. This contention is contrary to a line of cases of which *People v. Baker,* 25 Cal. App. (2d) 1 (76 Pac .(2d) 111—1938) is representative. See also *Henderson* v. U. S., 143 Fed. 681 (C. C. A. 9, 1944). In holding that evidence of similar transactions was admissible to show guilty knowledge and the intent of the defendant and to establish a definite prior design or system, the Court stated:

> "It is not essential that such similar transactions shall have resulted in the commission of a crime. It is sufficient if they tend to prove a scheme of the defendant which included the acts charged."

Conclusion.

It is respectfully submitted that the judgment of the trial court was not contrary to law and that the evidence produced at the trial of the cause was ample to support appellant's conviction upon Count VI as charged in the Information.

Respectfully submitted,

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APPENDIX A.

Revised Maximum Price Regulation No. 165 (7 Fed. Reg. 4734):

"'Sec. 1499.108. BASE-PERIOD RECORDS AND REPORTS. Every person selling consumer services for which, upon sale by that person, maximum prices are established by Maximum Price Regulation No. 165 shall:

"(a) Preserve for examination by the Office of Price Administration all his existing 'records' relating to the prices which he charged or pricing methods which he used for such of those consumer services as he supplied during March 1942, and his offering prices for supply of such consumer services during such month; and

"(b) Prepare on or before September 1, 1942, to the full extent of all available information and records, and thereafter keep for examination by any person during ordinary business hours, a statement showing:

"(1) The highest prices which he charged for consumer services supplied during March 1942 for which prices were regularly quoted in that month;

"(2) The pricing method, if any, regularly used during March 1942; and

"(3) All his customary allowances, discounts, and other price differentials.

"A duplicate of this Statement shall be filed, on or before September 10, 1942, with the 'appropriate War Price and Rationing Board of the Office of Price Administration.'"